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In the

Supreme Court of the United States

October Term, 1950.

No. 532.

JOHN S. OTTLEY, *Petitioner,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The opinion of the Supreme Court of Missouri is set forth in the Appendix of petitioner's brief at pages 37-53 thereof. The ruling of the Supreme Court of Missouri to the effect that plaintiff did not make a submissible case and that defendant's motion for a directed verdict should have been sustained by the trial court was based upon plaintiff's own testimony and facts which were concededly true under the record. Petitioner offered no evidence in support of the liability issue other than his own testimony. At the time of his injury he was on his knees, crawling under the couplers between two cars (Tr. 25). He did not go under the cars to perform any work upon them (Tr. 39). He was familiar with the written rules of the company that men were not supposed to crawl under cars (Tr. 9). His foreman had never instructed him to

crawl under cars or couplers (Tr. 27). When he went to work in the yard where the accident occurred he was furnished with a safety rule book and familiarized himself with the safety rules (Tr. 29, 30, 49). Rules 7 and 35 were in the following language:

> "*Rule 7.* Employees must not go between cars for any purpose without protection or knowing that cars or engines are not coming in from either end of track."
>
> "*Rule 35.* Employees must never crawl under cars or equipment unless proper protection is provided."

There was no evidence that petitioner had ever been instructed, ordered, or directed by his foreman or any other employee of the defendant to violate either of these rules, or to cut between or across standing cars without protection or knowledge that cars or engines were not coming in from either end of the track. Petitioner knew that it was dangerous to attempt to go between the cars without knowing whether or not they were going to be moved (Tr. 43). He looked both ways before he started under the cars because he knew and realized that engines or other cars might come into the track from other tracks (Tr. 43). He knew the cars under which he was crawling had been placed there temporarily (Tr. 45) and might move at any minute (Tr. 38, 52). It was usual and ordinary procedure in the yard in question for cars to be dropped in against a standing string of cars on a switch track and when this was done the moving cars were ordinarily stopped when they struck the other cars standing on the track (Tr. 54). In an ordinary switching movement it wasn't the custom and practice for men to ride the cars which were dropped in (Tr. 76, 77). Petitioner did not notify any member of the switch crew which was working on the lead which connected with the switch track, that he intended to crawl under the standing cars

(Tr. 47). If the brakes on the standing cars had been set they wouldn't have moved over a foot (Tr. 52). The brakes were not set on the cars in question. In this switch yard cars moved on any track at any moment (Tr. 52). Plaintiff did not expect any signal that the cars would be moved as the switch crew had no way of knowing when he might be going through a string of cars (Tr. 64). He simply took another chance in going through standing cars under the couplers and it so happened that the cars moved when he was under them. The cars were subject to be moved at any time (Tr. 69). There was no evidence of the existence of any rule, regulation, practice, or custom requiring any warning to plaintiff that cars were about to be dropped in against other cars already standing on switch tracks and it was plaintiff's own testimony that he expected no warning (Tr. 52, 64). An examination of the record in this case discloses that the findings of fact as set forth in the opinion of the Supreme Court of Missouri were based upon the plaintiff's own evidence at the trial. Plaintiff specifically testified that he had never been directed to crawl beneath couplers. It was conceded that it was not plaintiff's duty to perform any work about the cars under which he was attempting to crawl, and that none of defendant's employees in charge of the switch engine, or of the cars which were dropped in against the standing cars, had any knowledge of the fact that plaintiff was under the standing cars. The finding of the Supreme Court of Missouri that the plaintiff "voluntarily, unnecessarily, with knowledge of the attendant danger, in deliberate violation of the safety rules, and for his own convenience, he placed himself in a hazardous position" was sustained and uncontradicted by plaintiff's own sworn testimony.

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI.

Under petitioner's own sworn testimony his own negligence was the sole proximate cause of his injury and such injury was due to no negligence on the part of respondent, and the Supreme Court of Missouri properly reversed the judgment on the ground that plaintiff did not make a submissible case, and that defendant's motion for a directed verdict should have been sustained by the trial court.

Chesapeake & O. Ry. Co. v. *Mihas,* 280 U. S. 102, 50 S. Ct. Rep. 42.

Tennant v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 Sup. Ct. Rep. 409.

Brady v. *Southern Ry. Co.,* 320 U. S. 476, 64 S. Ct. Rep. 232.

Eckenrode v. *Pennsylvania R. Co.,* 164 Fed. (2d) 996.

Eckenrode v. *Pennsylvania R. Co.,* 335 U. S. 329, 69 Sup. Ct. Rep. 91.

Chicago, St. P., M. & O. R. Co. v. *Arnold,* 160 Fed. (2d) 1002.

Wolfe v. *Henwood,* 162 Fed. (2d) 998 (cert. denied 332 U. S. 773, 68 Sup. Ct. Rep. 88).

RESPONDENT'S ANSWERS TO PETITIONER'S "REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT."

In petitioner's "Reasons Relied Upon for Allowance of the Writ" it is contended that important and substantial rights created in favor of the petitioner by the Federal Employers Liability Act were destroyed by the decision of the Supreme Court of Missouri and that the Court failed to follow the Federal decisional law formulating and governing petitioner's rights in such regard in the manner set forth in the five respects set forth in petitioner's Petition for Certiorari (Tr. 11-14). These reasons will be discussed in the numerical order set forth in the petition.

1. Under the first reason it is recited that the record contains evidence from which the jury could and did find that petitioner was ordered to cut through the cars by going *under* the couplers. An examination of the record immediately discloses the fallacy of such contention. Plaintiff himself testified that he was familiar with the written rule of the company that no men were supposed to crawl under cars (Tr. 9) and that his foreman and no other superior had ever instructed or ordered him to crawl under couplers or cars for the purpose of getting from one side of the track to the other (Tr. 26, 27). He had no duty to perform under or about the car (Tr. 39).

2. Under point 2 of petitioner's reasons it is contended that the record contains evidence from which the jury could and did find respondent negligent in ordering petitioner to cut through standing cars. There was no evidence that petitioner was ever ordered or directed to cut through standing cars without proper protection or without knowing that cars or engines were not coming in

from either end of the track, or that petitioner was ever instructed to cut between or through cars in violation of the safety rules. As above stated, plaintiff himself unequivocally testified that his foreman had never instructed him to crawl under the cars or couplings. Furthermore, no such alleged negligence was hypothesized by petitioner in the submission of his cause to the jury (see plaintiff's Instruction No. 1, Tr. 182, 183).

3. Under point 3 of petitioner's reasons relied upon it is contended that the record contains evidence from which the jury could and did find that four wheat cars were caused and permitted to move against the standing cars on the track, with extraordinary and unusual and unnecessary force, knocking and moving the standing string in a manner which was dangerous to petitioner, and that by reason thereof the respondent failed to exercise ordinary care to furnish petitioner with a reasonably safe place in which to work. This contention utterly ignores plaintiff's own sworn testimony that he expected the cars under which he was crawling, to move at any time without warning; that he had no duty to perform about the cars; that no member of the switch crew saw or could have seen the plaintiff go under the couplers, or had any knowledge or notice that he was on or near the track and that plaintiff did not expect them to be looking out for him, or to notify him of any movement. The contention likewise ignores plaintiff's own sworn testimony that the brakes were not set on the cars in question and that they would not have even been moved a foot had the brakes been set (Tr. 52, 54); that it was a usual procedure for cars to be dropped in, onto and against a standing string of cars. It is apparent from plaintiff's own sworn evidence that the cars under which he was crawling moved more than a foot because the brakes were not set on the standing cars. However, it was not

alleged or submitted as a ground of recovery that defendant was in anywise negligent in failing to set the brakes on the standing cars, or to apply brakes on the moving cars.

4. There is no substance to petitioner's fourth reason that the decision of the Supreme Court of Missouri was based upon any theory of assumption of risk. The Court in its opinion correctly recognized that assumption of risk is no longer a defense under the Federal Employers Liability Act and that the only effect of contributory negligence is to diminish damages. The Supreme Court of Missouri correctly ruled that the sole proximate cause of petitioner's injury was his own negligence, and that under plaintiff's own evidence the respondent was guilty of no negligence. Under the decisions of this Court respondent was entitled to a directed verdict.

5. Under his fifth reason relied upon, petitioner contends that the Supreme Court of Missouri concerned itself almost exclusively with what it called the negligence of petitioner, stressing, emphasizing, reiterating and reemphasizing the *railroad's* evidence of its rules and petitioner's failure to comply with them. Petitioner overlooks the fact that the existence of the safety rules relied upon by the defendant was established by the direct testimony of petitioner and by his testimony under cross-examination. Petitioner testified on direct that he was familiar with the written rules of the company that no men were supposed to crawl under cars (Tr. 9). On cross-examination petitioner testified that when he went to work in the yard he was furnished with a safety rule book (Tr. 29), and that he familiarized himself with the rules upon receipt of the book (Tr. 30). He identified the book in which Rules 7 and 35 were contained, and such rules were offered in evidence as a part of his cross-examination (Tr. 30, 49).

RESPONDENT'S ANSWER TO PETITIONER'S ARGUMENT.

In petitioner's argument in support of his petition it is first contended that the evidence was such that an inference could and should have been drawn to the effect that petitioner had been directed to crawl *under* the cars or *under* the couplers. Petitioner would have this Court ignore his positive sworn testimony that he was never so directed. His testimony was that he had been directed to cut through strings of standing cars but not to crawl under such cars. Petitioner's contention in this regard likewise ignores the positive sworn testimony of petitioner that he knew it was dangerous to attempt to go between or under cars without knowing whether or not they were going to be moved. He was familiar with the rule that no employee was supposed to crawl under cars without protection, or without knowing there was no danger of the cars being moved. Before attempting to crawl under the cars in question he looked in both directions to see if anything was coming (Tr. 40). He knew and realized that at any moment engines or other cars might come onto the track from other tracks. He knew that it was dangerous to attempt to go between cars without knowing whether or not they were going to be moved (Tr. 43). Cars were constantly moving everywhere in the yard (Tr. 47). Cars might move on any track at any moment without warning (Tr. 52). It was a usual procedure for cars to be dropped in against a standing string of cars and the moving cars would ordinarily be stopped by collision with the standing cars (Tr. 54).

From the foregoing and the whole record in the case it could not, and should not, be inferred, as contended by the petitioner, that he had been instructed by his foreman

to pass under the couplers in the exact manner he was following at the time of his injury. Petitioner was and is bound by his own sworn and positive testimony that he had not been so instructed. In the petition filed by the petitioner it was alleged that respondent was negligent in causing the cars under which petitioner was crawling to be violently and with unusual, extraordinary and unnecessary force, struck and violently knocked, shunted, rolled and moved (Tr. 3). There was no evidence of any custom, practice, rule or duty on the part of respondent to warn petitioner before moving the cars under which he was crawling. Petitioner himself testified that he expected that the cars might move at any moment without warning. He did not rely upon any warning of the movement of the cars. No such issue was submitted to the jury. Petitioner had no duty to perform on or about, or under the cars and he testified that the switch crew had no way of knowing that he was about to crawl under the cars in violation of the printed safety rules. On pages 25 and 26 of petitioner's argument it is contended that in an ordinary movement the cars would not have moved over eight to ten inches and that such an ordinary movement would not have affected plaintiff's safety in crawling under the coupler. This contention ignores the petitioner's testimony that the cars would not have moved over eight or ten inches no matter how hard they were hit had the brakes been set (Tr. 17), and his testimony on cross-examination that had the brakes been set on the standing cars on the occasion in question, the cars would not have moved over a foot (Tr. 52, 54). We have already called attention to the fact that it was not alleged that defendant was in anywise negligent in failing to set the brakes on the standing cars. Neither was such issue submitted to the jury. There was no evidence in the case of any duty on the part of any employees of the defendant to ride

cars which were dropped from a lead onto a switch track and against standing cars for the purpose of protecting employees who might be crawling under the standing cars in violation of the company's safety rules. Petitioner himself testified that it was the general custom and practice for cars to be pushed or rolled into switch tracks at any time, without being ridden by switchmen in a position to reduce the speed of such cars (Tr. 76, 77). Petitioner expected no advance warning of the movement of the cars under which he was crawling. There was no evidence of any rule, custom, or practice requiring warning, of a movement of such character as was involved and no such issue was hypothesized by petitioner as a ground for recovery in his instructions to the jury.

The case of *Chesapeake & O. Ry. Co.* v. *Mihas,* 280 U. S. 102, 50 S. Ct. Rep. 42, appears directly in point. If there was no evidence of negligence on the part of respondent or if petitioner's own evidence disclosed that his own conduct was the sole cause of his injury, then clearly petitioner was not entitled to recover.

In *Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. Rep. 409, this Court declared:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 67, 63 S. Ct. 444, 451, 143 A. L. R. 967. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' "

The evidence in the case at bar having failed to establish that there was any duty on the part of the respondent to so operate its switch yards and tracks as to make it safe for petitioner to crawl beneath standing cars without protection, there was no duty on the part of respondent toward petitioner to anticipate that petitioner would violate respondent's written safety rules or voluntarily expose himself to a known and dangerous hazard. The decision of the Supreme Court of Missouri was squarely based upon the testimony of petitioner himself. It was not necessary for the Court to weigh the credibility of witnesses and but one reasonable conclusion could be reached. The rule declared by this Court in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. Rep. 232, is applicable. In that case this Court declared:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

In the case at bar petitioner knew that a switch crew was working on the lead connected with the track upon which the cars were standing. He knew and anticipated that this crew might at any moment drop cars onto such switch track and against said standing cars. He knew that the brakes were not set on the standing cars. He knew that the switch crew had no knowledge of his intention of crawling under the cars in violation of company safety rules. He knew that said crew were in such a position that he could not be seen by them. He expected no warn-

ing in event the standing cars were moved by reason of other cars being dropped in against them on the switch track.

In the case of *Eckenrode* v. *Pennsylvania R. Co.*, 164 Fed. (2d) 996, the Court of Appeals for the Third Circuit ruled the negligence in failing to take precaution required existence of some danger toward which precaution should be directed. In that case the Court said (l. c. 999):

> "For a man to be charged with negligence in failing to take precautions there must be some danger toward which these precautions should be directed."

In that case this Court granted certiorari and in its judgment affirmed the decision of the Court of Appeals. See *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 69 S. Ct. Rep. 91. In sustaining the Court of Appeals this Court said:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in the light most favorable to the petitioner, which can sustain a recovery for her."
>
> "Accordingly, the judgment is affirmed."

In *Chicago, St. P., M. & O. R. Co.* v. *Arnold*, 160 Fed. (2d) 1002, the Court of Appeals for the Eighth Circuit ruled and held that in a servant's action under the Federal Employers' Liability Act, the servant's disregard of a specific order or of a standing rule which directly

caused his injury, barred a recovery. In the opinion many Federal cases are cited in support of the rule.

In *Wolfe* v. *Henwood,* 162 Fed. (2d) 998 (cert. denied 332 U. S. 773, 68 S. Ct. 88), it was ruled that a recovery could not be had under the Federal Employers' Liability Act where fatal injuries were sustained by the employee as a direct result of his own affirmative and voluntary act which directly caused the fatal injury.

In the case at bar, the opinion of the Supreme Court of Missouri was based upon the plaintiff's own testimony. The Court did not resolve disputed evidence against the plaintiff and did not weigh the evidence. It correctly ruled and held that under the plaintiff's own sworn testimony his own negligence was the sole cause of his unfortunate injury, and that under such evidence the respondent was guilty of no negligence which in whole or in part caused the injury. In so ruling and holding, the Supreme Court of Missouri correctly applied and followed the rules laid down by this Court, and correctly held and ruled that petitioner failed to make a submissible case and that respondent's motion for a directed verdict should have been sustained. The judgment of the Supreme Court of Missouri was therefore proper and petitioner's application for certiorari should be denied.

Respectfully submitted,

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